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IN THE

# Supreme Court of the United States

October Term, 1959

No. ~~575~~ 72

PAUL JOHN CARBO,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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IN THE

# Supreme Court of the United States

October Term, 1959
No. 875

PAUL JOHN CARBO,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

### Argument.

1. Respondent sweeps with too broad a brush and stops too soon when it says (Reply, pg. 4) that the "question raised by the petition for writ of certiorari is the power of the District Court for the Southern District of California to bring before it for trial a prisoner held by state officials in New York." Omitted from this formulation (cf. petition, pg. 2) is the crucial element as to the power of the District Court to thus exercise extra-territorial jurisdiction by means of the writ of *habeas corpus ad prosequendum.*

Respondent does not gainsay that the question is an important one nor that it has never been decided by this Court (cf. Petition, Point II, pp. 11-13).

Comparable questions are constantly arising. Cf. the filing of April 28, 1960 of petition for writ of certiorari

in *Aristeguieta v. First National Bank of New York*, No. 892, Oct. Term, 1959, this Court, 28 L.W. 3327, where the Court of Appeals for the Fifth Circuit (274 F. 2d 206) *reversed* the Florida District Court which had decided, inter alia, that it had extraterritorial jurisdiction to issue a subpoena duces tecum to a New York bank in connection with an extradition proceeding (28 L.W. 3334). It thus appears that the mere fact the district court "has jurisdiction of the subject matter" (Govt. Reply, pg. 5) does *not* enlarge its territorial jurisdiction. What respondent overlooks in analogizing (Govt. Reply, pg. 5) jurisdiction over a 28 USC 2255 proceeding with jurisdiction over an alleged crime is that section 2255 contains within itself the exception to the general rule as to territorial limitation (see Pet. pg. 19). Not so the mere fact that a court has jurisdiction over an offense. The District Court's jurisdiction over an offense is traditionally territorial, even having constitutional roots (6th Amendment). Accordingly, it takes a specific expression of an exception to the general rule (e.g. § 2255) to enlarge the court's territorial jurisdiction. None can be found merely because a court has jurisdiction over an offense.

We do not believe tenable the Government's position (Reply, pp. 6-7) that 28 USC 2241(c)(5) applies only to the writ of *habeas corpus ad subjiciendum*. In the first place, such a reading flies directly in the teeth of the explicit language of the subsection:

> "The writ of habeas corpus shall not extend to a prisoner unless (I)t is necessary to bring him into court to testify or for trial."

To say that this wording contemplates an inquiry into the cause or legality of detention, is to stand even "congressional English" (*Commissioner of Internal Revenue v. Acker,* ..... U.S. ....., 28 L.W. 4009, 4011, dissenting opinion) on its head.

Moreover, what is now 28 USC 2241(c), including subdivision (5) thereof, was derived from former 28 USC (1940 ed) 453 [R.S. § 753] which did not contain the phrase "for the purpose of an inquiry into the cause of restraint of liberty." The quoted phrase was in former 28 USC (1940 ed) 452 (which was a combination of R.S. 752 and §6 of Ch. 229 of Act of Feb. 13, 1925, 43 Stat. 940). Accordingly it would appear that the Reviser's Note, following 28 USC 2241, is an oversimplification of the meaning to be attributed to the elimination of the quoted phrase when 28 USC (1940 ed) 451, 452 and 453 were combined into the one section 2241. Equally as plausible—or actually, more plausible—an explanation is that by reason of subdivision (c)(5), the words were not accurate or descriptive.

The thrust of *Phillips v. Hiatt,* 83 Fed. Supp. 935 (D. Del. 1949) and *In the Matter of Karol Van Collins,* 160 Fed. Supp. 165 (D. Me. 1958) cannot be blunted on a theory that these cases involved "an inquiry into the legality of detention" (Govt. Reply, 7). A reading of those cases, we submit, permits of no such conclusion. Petitioners in those cases were not complaining that they were illegally detained, nor were they seeking release from custody. Each was simply seeking, each of them being in federal custody, to be brought for trial before a federal district court before which a criminal charge against him

was pending, a district court which, to use respondent's language (Repl. 5), "has jurisdiction of the subject matter . . . , . . . the crimes charged in the indictment." Indeed, the courts specifically considered their power under both 2241(c)(5) and 1651(a)—the latter section being ignored by respondent—and precisely concluded that neither, including 1651(a), enlarged the territorial jurisdiction to issue the writ.

Assuredly, the Government's position is illogical. It means that if the prisoner asks the court to exercise extraterritorial jurisdiction to bring him into court for the purpose of availing himself of the constitutional right to a speedy trial, the court has no such jurisdiction; but if the Government asks for the extraterritorial exercise of power to bring the prisoner to trial on the same charge, the court has jurisdiction. Such a contradictory and capricious view of jurisdiction cannot be permitted. The court's exercise of power is the same in both cases. It either has the power to issue an extraterritorial writ of *habeas corpus ad prosequendum*, or it does not. That power or lack of it does not depend upon which party to the litigation makes the request.

In any event, this discussion demonstrates that the question is so important as to call for review by this Court. The concession by the Government (Reply 7) of the inconsistency of its views with those of the *Hiatt* and *Van Collins* cases furnishes additional reasons for review here.

We do not believe it can properly be said (Govt. Reply, pg. 6) that *U.S. ex rel. Moses v. Kipp*, 232 F. 2d 147 (CA 7) decided so soon (1956) after *Edgerly v. Ken-*

*nelly*, 215 F. 2d 420 (CA 7 1954) and *Goldberg v. Hoffman*, 225 F. 2d 463 (CA 7 1955), without mention of either, overruled those two cases, even *sub silentio*. The fact is that in the *Moses* case the *jurisdiction* of the District Court to issue an extraterritorial writ of *habeas corpus ad prosequendum* was not questioned. The question involved was whether a prisoner could "insist upon the priority of" a federal over a state conviction (232 F. 2d at 150). Petitioner makes no such contention here. What he does contend for is the lack of *jurisdiction* in the district court to issue an extraterritorial writ of *habeas corpus ad prosequendum* whether addressed to the same or a different sovereignty. The fact that the writ of *habeas corpus ad prosequendum* is a "traditional method for bringing a person already serving a sentence before a court for trial" (Govt. Br. 5), does not, as respondent implies (ibid), solve the problem. In the United States, the power to issue a writ of habeas corpus is statutory. And, as we assert, that power is limited territorially and Congress has not seen fit to make an exception as to the writ of *habeas corpus ad prosequendum*.

Petitioner does not rely (Govt. Repl. pg. 6) upon *Taylor v. McGrath*, 194 F. 2d 882 (CA DC 1952) on the merits. He called that case to the attention of this Court (Pet. 11) to point up that it was not clear what the present view of the District of Columbia Circuit was; that at least one case, *Phillips v. Hiatt*, 83 Fed. Supp. 935, 939-940 (D. Del. 1949) had considered that circuit to have overruled earlier decisions which seemed to have sustained extraterritoriality. If that be so, then on the ground of conflict of circuits along with that shown (Pet.

6-10) as to the Seventh, Third and First, this is a proper case for the grant of certiorari. (Rule 19(1)(b) (1st phrase) of this Court).

The final point made by respondent (Reply, 8) is that a writ of *habeas corpus ad prosequendum* "is of the same nature" as a subpoena or a warrant of arrest which, under Rules 4(c)(2) and 17(e)(1), respectively, Federal Rules of Criminal Procedure, run anywhere in the United States. The writ may or may not be of the same nature as a subpoena or warrant of arrest. But whether it is or not does not assist in the solution of the question. The point is (see Pet. 16) that Congress (through the rule making power of this Court) specifically carved out an exception to the District Court's territorial jurisdiction in the matter of subpoenas and warrants of arrest. It did not do so in the matter of the writ of *habeas corpus ad prosequendum*. The existence of the exception as to the former, therefore, argues against—rather than for—the existence of an exception as to the latter.

2. Respondent argues (Reply, 8) that petitioner has no standing to raise the issue that the District Court has no extraterritorial jurisdiction to issue a writ of *habeas corpus ad prosequendum*.

Initially, we submit, the matter should not be considered by this Court. The point was not passed upon by the court below, the case having been submitted on the merits (III, 5).[1] Accordingly, respondent not having

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[1]It is true that respondent raised the point before the lower court in its motion to dismiss the appeal (Supp., Motion 1, 3, 7). However, upon oral argument it was stipulated that the appeal itself be submitted to the court on the merits (III, 5), this was done and the court ruled on the merits (*ibid.*).

filed a cross-petition for writ of certiorari, the question should not be passed upon herein (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 200). The general rule is that a point not pressed or passed upon by the court below will not be reviewed here (*Duignan v. United States*, 274 U.S. 195, 200; *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225). We submit that that rule and not an exception should be applied here.

In any event, petitioner does have standing to raise the issue. The cases relied upon by the Government (Reply, 8) are inapposite. In none of them was the fundamental question of the *jurisdiction* of the court to act extraterritorially involved. Petitioner is not here claiming immunity from a second prosecution (*Ponzi v. Fessenden*, 258 U.S. 254), nor is he claiming the right to priority of judgment as between one sovereign and another (*U. S. ex rel. Moses v. Kipp*, 232 F. 2d 272 [CA 8 1956]), nor is he claiming that the federal court cannot try him unless and until the state proceedings are ended (*Barrett v. United States*, 270 F. 2d 772 [CA 8 1959]).

Petitioner is claiming that the order which affects him so substantially and directly was made without jurisdiction of the court. Since parties cannot waive lack of jurisdiction (*Ahrens v. Clark*, 335 U.S. 188, 193), it would seem clear that a person so vitally affected by the order has standing to call to the attention of the court the lack of jurisdiction.

Since "it is the duty of every court of its own motion to inquire into the matter (of jurisdiction) irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law," (*Minne-*

*sota v. Hitchcock*, 185 U.S. 373, 382) respondent cannot avoid inquiry into the issue on a theory that petitioner has no right to raise it.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 this Court held that organizations listed by the Attorney General in connection with the Government's *internal* personnel problem and where no action was being taken against the organizations nor anything required of them, had standing to test the validity of the Attorney General's action. Answering the standing to sue argument Mr. Jutice Frankfurter, in his concurring opinion, pointedly said (341 U.S. at 157):

> ". . . The objection to judicial restraint of an unauthorized exercise of powers is not weighty."

Finally, we submit, the problem involved in this case, including the question of the right to raise the issue, is important and substantial. It affects a not inconsequential facet of the administration of justice in the federal courts. The case is one appropriate for review by this Court.

## Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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